



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

MEMORANDUM

DAVID P. LITTELL
COMMISSIONER

To: Board of Environmental Protection

FROM: Jeff Madore, George Seel, Bureau of Remediation and Waste Management

DATE: October 15, 2009

RE: Provisional Adoption of Chapter 692, Siting of Oil Storage Facilities

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Statutory and Regulatory References:

- 38 MRSA chapter 13-D (§§ 1391-1399) [re: wellhead protection];
- 38 MRSA §341-D(1-B) [authorizing the board to adopt, amend or repeal reasonable rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering];
- PL 2007, chapter 569, section 7 [directing the Board of Environmental Protection to adopt rules that restrict the siting of facilities listed in 38 MRSA § 1393(1) within significant sand and gravel aquifers mapped by the Maine Geological Survey].

Scope:

Chapter 692 applies to the siting of aboveground and underground oil storage facilities in wellhead protection areas and within certain ground water aquifers as defined in the rule.

Description:

P. L. 2007, Chapter 569, amended Title 38 to establish a restriction on the siting of oil storage facilities, as well as other designated facilities, in wellhead protection zones and within aquifers mapped by the Maine Geological Survey. The department chose to pursue two rulemakings, one addressing solely oil storage facilities, Chapter 692, and Chapter 700 that addresses the other designated facilities.

Chapter 692 closely mirrors the legislation and includes provisions for variances from the siting restrictions for oil storage facilities in a number of instances:

- 1) When it has been demonstrated that there is no hydrological connection between the facility and the water supply at issue;

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- 2) When it has been affirmatively demonstrated that the aquifer has been incorrectly mapped;
- 3) When it has been affirmatively demonstrated that the aquifer has a potentially low use or is polluted; or
- 4) When an applicant has demonstrated that the facility will be designed and installed to further reduce the risk of discharges of oil and the likelihood of future ground water contamination.

The rule does not provide for variances within high potential aquifers as identified in the rule.

The rule includes specific engineering, siting and monitoring criteria to ensure that the intent of the enabling legislation is met.

That portion of the rule addressing the siting of oil storage facilities in wellhead protection zones is eligible for adoption pursuant to the department's discretionary rulemaking authority as routine technical. That portion of the rule addressing the siting of oil storage facilities within high potential sand and gravel aquifers mapped by the Maine Geological Survey, is required by section 7 of P. L. 2007, Chapter 569 to be adopted as major substantive. For the sake of expediency and to avoid confusion, the department has chosen to follow the major substantive rulemaking procedures for the entire chapter.

When the draft Chapter 692 was posted to public hearing and comment on June 18, 2009, the Board also posted Rules for Underground Oil Storage Facilities, 06-096 CMR chapter 691(3)(A)(last amended April 3, 2007) to public comment. The department was proposing to repeal the siting requirements for underground oil storage facilities in 06-096 CMR 691(3)(A) as those requirements were recodified with the siting requirements for aboveground oil storage facilities in Chapter 692. Chapter 692, as major substantive, is required to be reviewed by the Legislature before being reconsidered by the Board for final adoption. However, as the repeal of 06-096 CMR 691(3)(A) was proposed as routine technical, it would have repealed the siting requirements for underground oil storage facilities well in advance of the establishment of siting requirements for both aboveground and underground oil storage facilities in Chapter 692. So, whereas the changes to 06-096 CMR 691(3)(A) would be due to take effect within 30 days of filing with the Secretary of State after adoption by the Board, Chapter 692, if authorized by the Legislature and subsequently adopted by the Board, would have an effective date sometime in mid 2010. Therefore the department is not requesting that the Board take any action on the proposed repeal of 06-096 CMR 691(3)(A) as posted on June 18, 2009.

Pursuant to 5 M.R.S.A. § 8052(7), the proposed repeal of 06-096 CMR 691(3)(A) will not take effect if not adopted by the Board within 120 days of the end of the comment period on the rule (July 30, 2009).

At such time as Chapter 692 becomes effective, the department will again initiate rulemaking to repeal 06-096 CMR 691(3)(A) to ensure that there is no disruption in the rules regulating the siting of underground oil storage facilities.

The Board held a public hearing on the rule in Augusta on August 8, 2009. The only comments received at the public hearing and during the comment period were from a representative of the Maine Oil Dealers Association (MODA). While generally supportive of the rule, MODA suggested expanding the ability to apply for a variance to “applicant” in addition to owner and adding a provision that would allow for an owner or applicant to apply for a variance within high potential aquifers. Attached to the rule proposed for adoption is the Basis Statement which details the specific comments received into the public record and the Department’s responses. Copies of the comments have been provided to you under separate cover.

Attached is an underline/strikeout version of the rule incorporating a number of changes in response to the comments received. These changes include:

- Eliminating the definition of “owner” and replacing the term owner with the term “applicant” as it applies to application requirements throughout the rule. Section 5 requires that an application meet the requirements of Rules Concerning the Processing of Applications and Other Administrative Matters, 06-096 CMR 2 (last effective date April 1, 2003) that sets forth the application requirements for title, right or interest, including but not limited to ownership, an option to buy or leasing agreements.
- Eliminating the language in Section 3(A)(4) after the word “premises” as the language is redundant.
- Adding the qualifying language “Notwithstanding Section 4(B),” at the beginning of the first sentence in the first paragraph in Section 4(E). This would clarify that an applicant cannot apply for a variance within high potential aquifers as identified.

Environmental Issues:

The requirements of the rule support the implementation of Maine’s new wellhead protection law, Wellhead Protection, 38 MRSA §§1391-1399. The purpose of the law as stated in section 1391 is “to protect the health, safety and welfare of Maine’s citizens by establishing a coordinated statewide program to protect drinking water wells from contamination by oil or hazardous substances.” The law accomplishes this purpose mainly by restricting the siting of oil storage facilities that, by their nature, pose an unacceptable risk to groundwater quality and therefore should be kept away, if at all possible, from drinking water supplies, including sand and gravel aquifers mapped by the Maine Geological Survey. These aquifers are the most cost effective potential future public water sources for Maine communities fortunate enough to have them but they are particularly vulnerable to contamination because of their inherent permeability.

Department Recommendation: The Department recommends that the Board provisionally adopt Chapter 692.

Estimated Time of Presentation: 45 minutes.